

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DARRICK L. HUNTER,

Plaintiff,

v.

CHARLES N. ROHRER, *et al.*,

Defendants.

CASE NO. 3:18-cv-05198-BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR: May 7, 2021

This 42 U.S.C. § 1983 civil rights action is before the Court on referral from the District Court under 28 U.S.C. § 636(b)(1)(A)–(B) and local Magistrate Judge Rules 1, 3, and 4. *See* Dkt. 55.

Plaintiff, a prisoner in the custody of the Washington State Department of Corrections (“DOC”), brings claims arising from his incarceration at Stafford Creek Corrections Center (“SCCC”). He sues Charles Rohrer and Timothy McCandless, who are both SCCC sergeants, and an SCCC superintendent, Margaret Gilbert. Plaintiff alleges that Rohrer and McCandless were upset when SCCC custodial crew supervisor Mark Sherwood began hiring “primarily

1 black” offenders (Dkt. 67, at 3) and that Rohrer then implemented a strip search policy that
2 targeted only the custodial crew at SCCC, that Rohrer and McCandless discriminated against
3 plaintiff and the custodial crew on the basis of race, and that Rohrer retaliated against plaintiff
4 when he protested the discriminatory treatment. *See* Dkt. 67. Plaintiff brings claims of
5 retaliation and violation of the Fourth and Eighth Amendments, Due Process, and Equal
6 Protection.

7 Defendants have moved for summary judgment dismissal of these claims. Dkt. 72. The
8 motion should be granted in part and denied in part. Specifically, the Court should accept
9 plaintiff’s concession that all claims against Gilbert should be dismissed, as well as his claims for
10 violation of the Eighth Amendment and Due Process. *See* Dkt. 81; Dkt. 82, at 24 n.10. The
11 Court should also accept plaintiff’s narrowing of his claims against McCandless to solely a claim
12 for violation of Equal Protection and the Fourth Amendment. *See* Dkt. 82, at 17 n.7 & 18 n.8.

13 However, the Court should deny defendants’ request for summary judgment dismissal of
14 the Equal Protection, Fourth Amendment, and retaliation claims against Rohrer. First, contrary
15 to defendants’ argument, plaintiff has exhausted his claims. Second, and relevant to his Equal
16 Protection claims, plaintiff has raised triable issues of fact regarding whether other, similarly
17 situated groups—that is, white crews who worked in the same areas as the custodial crew—were
18 not strip searched and has provided evidence supporting the conclusion that racial animus
19 motivated Rohrer. Third, and relevant to his Fourth Amendment claim, plaintiff has come
20 forward with evidence to support the conclusion that Rohrer directed strip searches based on
21 racial animus and that these strip searches did not comply with prison and DOC policies.
22 Finally, regarding retaliation, plaintiff has come forward with evidence that Rohrer abused prison
23 policy in order to retaliate against plaintiff by having him labelled a security threat and
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1 terminated him from his job. Therefore, plaintiff's retaliation claim also survives summary
2 judgment.

3 As for the claims against McCandless, plaintiff has provided evidence that racial animus
4 motivated McCandless to confiscate equipment from the custodial crew, but not other, white
5 crews of prisoners, but plaintiff has failed to show that McCandless participated in the strip
6 search policy. Therefore, the Equal Protection claim against McCandless should proceed, but the
7 Fourth Amendment claim should be dismissed with prejudice.

8 BACKGROUND

9 I. Proceedings to Date and Allegations of Operative Complaint

10 Plaintiff, acting *pro se*, brought suit in this Court in March 2018. *See* Dkt. 1. The Court
11 directed service of the complaint and, in April 2019, recommended granting defendants'
12 summary judgment motion and dismissing plaintiff's claims. *See* Dkt. 42, at 2. However, the
13 District Court appointed counsel for plaintiff (Dkt. 51) and, in December 2019, the District
14 Court, upon receipt of a joint status report from the parties, re-opened discovery. Dkt. 55, at 2.
15 Thereafter, the District Court declined to adopt the Report and Recommendation and referred the
16 matter for further discovery and dispositive motions. Dkt. 55, at 2.

17 With the benefit of counsel, plaintiff filed the operative complaint. Dkt. 67. He alleges
18 that Rohrer and McCandless were upset when supervisor Sherwood began hiring primarily black
19 offenders onto the custodial crew in the engineering section of the SCCC "HUB" area and that
20 Rohrer initiated a strip search procedure as pretext for racial discrimination against the custodial
21 crew. *See* Dkt. 67, at 3–4. Plaintiff alleges that Rohrer used the guise of addressing security
22 breaches in the Extended Family Visit ("EFV") area of the HUB that the custodial crew cleaned
23 to justify the strip search policy—even though "[n]one of Sherwood's custodial crew members
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were implicated in the former security breaches that Rohrer’s strip search[es] were meant to address.” *See* Dkt. 67, at 3–4. Plaintiff alleges that this strip search policy was administered, at Rohrer’s direction, in a racially disparate and demeaning manner and in violation of DOC policy. *See* Dkt. 67, at 3–11. Moreover, other offender crews who worked in the EFV area and who consisted of “mostly white and non-black offenders” were not subjected to strip searches. Dkt. 67, at 3–4.

Plaintiff also alleges that he threatened to file—and later filed—grievances protesting Rohrer’s actions and that as a result, Rohrer retaliated against him, including attempting to have plaintiff suspended from his job on the custodial crew (and later, his job in the chair shop), labelling him a “security threat,” and harassing him. *See* Dkt. 67, at 6–9. Plaintiff also alleges that McCandless shared Rohrer’s racial animus toward Rohrer and the custodial crew and, as a result, confiscated their gloves and safety glasses. *See* Dkt. 67, at 9; *see also* Dkt. 86-3, at 8 (claiming that Rohrer required only the custodial crew to wear vests). Plaintiff clarifies in his response to summary judgment that these allegations are evidence of Rohrer and McCandless’s racial animus and disparate treatment toward the custodial team, as well as evidence of Rohrer’s retaliation. Dkt. 82, at 18 n.8.

The parties have now completed briefing on defendants’ summary judgment motion (Dkt. 72), and the matter is ripe for decision. As noted, the parties have also stipulated to dismissal of plaintiff’s claims against defendant Gilbert. Dkt. 81.

II. Summary Judgment Motion

A. Defendants’ Materials

For a second time, defendants seek summary judgment dismissal of all claims in this matter. *See* Dkt. 72. Defendants cite to declarations and evidence in support of their previous

1 summary judgment motion, including declarations from an SCCC investigator (Dkt. 29),
2 defendant Rohrer (Dkt. 31), defendant McCandless (Dkt. 32), and the chair shop supervisor
3 (Keith Morgan) (Dkt. 33). Defendants now also provide declarations from SCCC Correctional
4 Captain Eric Mainio (Dkt. 73), an SCCC plant manager regarding scheduled work orders at
5 SCCC (Dkt. 75) and excerpts from depositions of Sherwood, Hunter, McCandless, and Rohrer.
6 *See* Dkt. 74.

7 In the SCCC, according to Captain Mainio, the “HUB” area is separate from “general
8 Incarcerated Living and daily movement areas” and contains maintenance and other operations
9 “that potentially create a higher risk of escape and introduction and movement of contraband due
10 to the material, tools, movement, and access by vendors and visitors.” Dkt. 73, at 2. Direct
11 supervision of incarcerated workers is “often not maintained.” Dkt. 73, at 2.

12 Relevant to the claims in this lawsuit, the HUB area also contains EFV units where
13 prisoners can stay overnight with family. Dkt. 73, at 2. The EFV units—where prisoners and
14 outsiders intermingle—“have historically been an avenue by which incarcerated individuals
15 introduce contraband into the secure perimeter of the facility.” Dkt. 73, at 2. This has been an
16 issue despite strip searches of prisoners and their families. *See* Dkt. 73, at 2.

17 According to the SCCC investigator, in 2014, SCCC staff learned that an offender on the
18 custodial crew was smuggling contraband from the EFV units into the facility. *See* Dkt. 29, at 2.
19 Defendant Rohrer testified at his deposition that the individual told SCCC staff that “what they
20 [the custodial crew] do is they pick up the drugs and they would smuggle them back into the
21 facility from the stove that they were hiding them in.” Dkt. 74-4, at 7. According to defendants,
22 the custodial crew was uniquely situated to smuggle contraband into the facility because the
23 custodial crew regularly and predictably accessed the EFV units, they could not be constantly
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1 supervised, and they entered the EFV units right after visitors left. *See* Dkt. 73, at 3; Dkt. 74-1,
2 at 6; Dkt. 74-4, at 12.

3 Therefore, according to defendants, in 2014 and in response to issues with the custodial
4 crew smuggling contraband into the facility, “the Superintendent, the captain, and others in the
5 chain of command [including, presumably, Rohrer] determined that the custodial crew would be
6 strip searched after they finished cleaning the EFV units.” Dkt. 29, at 3. On November 4, 2014,
7 Chris Idso, the facility manager, emailed SCCC engineering staff that “offenders working in the
8 EFV’s in a semi-supervised capacity will be strip searched when they are done” and that this
9 meant that the “porter crews” would “always” be searched. Dkt. 31-1, at 2. Within minutes,
10 Rohrer emailed staff that “[a]s of today all[,] EFV cleaning crews will be searched before leaving
11 the EFV unit being cleaned.” Dkt. 31-1, at 4.

12 Plaintiff was later hired onto the custodial crew (*see* Dkt. 34-1, at 7), and Rohrer claims
13 that he began having issues with plaintiff as early as January 2016. On January 22, 2016, Rohrer
14 emailed Sherwood (plaintiff’s supervisor) that Rohrer had sent plaintiff back to his unit for the
15 day after plaintiff “continued to escalate” during a discussion about his health status report
16 (“HSR”). Dkt. 31-1, at 7. Rohrer stated that plaintiff had claimed to be unable to eat his lunch
17 even though his HSR did not document the allergies plaintiff claimed to have. *See* Dkt. 31-1, at
18 7. According to Rohrer, this was the second time that plaintiff had become “argumentative and
19 loud” when discussing his allergies and that Rohrer punished plaintiff by sending him back to his
20 unit due to plaintiff’s “escalating and disruptive behavior.” Dkt. 31, at 4–5.

21 Rohrer states that on January 26, 2016, plaintiff was “out of bounds”—conducting
22 activities he was not authorized to do—in the kitchen and “T-Building” areas. Dkt. 31, at 5–6.
23 Rohrer emailed staff, including Sherwood, that plaintiff was out of bounds and appeared to have
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1 | been lying to and trying to manipulate kitchen staff and a job coordinator. *See* Dkt. 31, at 6.
2 | Rohrer states that “as the Industries Sergeant, I felt that it was my job to express my security
3 | concerns regarding Mr. Hunter’s continued employment” and that he “did not feel [plaintiff]
4 | should work in the HUB[.]” Dkt. 31, at 6. Rohrer states that Sherwood then suspended plaintiff.
5 | Dkt. 31, at 7.

6 | Plaintiff filed a grievance claiming that Rohrer and McCandless “harassed me because
7 | I’m Black while working for Sherwood in the custodial office” (Dkt. 34-1, at 5) and wrote
8 | Superintendent Gilbert a letter stating that he was being harassed and targeted by Rohrer on the
9 | basis of racial discrimination. Dkt. 34-1, at 7.

10 | Plaintiff subsequently began work in the chair shop, where Rohrer claims that he
11 | continued “to behave in ways that compromised the safety and security of the HUB[.]” Dkt. 31,
12 | at 7. On April 11, 2016, Rohrer states that plaintiff lied about having permission to bring his
13 | lunch through the HUB to the main facility and back again. Dkt. 31, at 7. Rohrer again emailed
14 | staff about his security concerns regarding plaintiff. Dkt. 31, at 7. Later in April 2016, Rohrer
15 | expressed concern when he learned plaintiff was being transferred back to the custodial crew,
16 | stating that plaintiff had “once again been caught lying to four staff members[.]” Dkt. 31, at 7.

17 | Defendants also provide their internal investigation, concluded in July 2016, after
18 | plaintiff returned to the custodial crew, finding that the allegations of staff misconduct against
19 | Rohrer were unfounded. Dkt. 34-1, at 22.

20 | **B. Plaintiff’s Materials**

21 | Plaintiff originally provided only his declaration in support of his response to summary
22 | judgment, with attached documents. *See* Dkt. 38. Plaintiff has now supplemented his evidence
23 | with declarations from two other custodial crew members (Dkts. 84–85), his supplemental
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1 declaration (Dkt. 83), and depositions of himself, Sherwood, Gilbert, Rohrer, and other SCCC
2 staff members Ed Baldwin, Ryan Denzer, and Jason Miller. *See* Dkt. 86.

3 Plaintiff relies on Sherwood's testimony that Sherwood began working at SCCC in July
4 2014 (Dkt. 86-3, at 9) and that shortly afterward, he hired the first black offenders on the
5 custodial crew (and indeed, in the HUB). *See* Dkt. 86-3, at 5, 7–8, 21; *see also* Dkt. 86-2, at 7
6 (plaintiff's deposition testimony that prisoner were complaining that "black inmates . . . [were
7 not] able to get . . . jobs" in the HUB). Sherwood began having issues with Rohrer and
8 McCandless after hiring black custodial crew members: Sherwood testified that he felt that they
9 were "harassing [his] work crew" and unfairly targeting them for strip searches. *See* Dkt. 86-3,
10 at 7. And shortly after Sherwood started, he claims that McCandless asked him "why are you
11 hiring all these blacks[?]" Dkt. 86-3, at 7. Sherwood also states that Rohrer asked him the same
12 question. *See* Dkt. 86-3, at 8. Indeed, another custodial crew member claims to have heard
13 Rohrer and McCandless refer to Sherwood's crew by a racially derogatory name (Dkt. 84, at 3)
14 and that after Sherwood hired two more black prisoners, McCandless and Rohrer seemed to be
15 watching the custodial crew as if they "were looking to find things we were doing wrong." Dkt.
16 84, at 2.

17 Plaintiff claims that although Idso's email referred to all "porter crews" being strip
18 searched in response to contraband issues, Rohrer took it upon himself to apply this policy only
19 to the primarily black custodial crew. *See* Dkt. 82, at 6; *see also* Dkt. 83, at 2 (plaintiff's
20 declaration stating that the custodial crew was "the only porter crew that consisted of all Black
21 inmates" and that they had one white coworker, who did not work inside the EFV units).
22 Although work orders show that other maintenance crews often worked in the EFV units,
23 plaintiff states that he does not recall that any other prisoners who worked in the EFV units were
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1 strip searched—only the custodial crew. *See* Dkt. 83, at 3; *see generally* Dkt. 83-1 (documenting
2 instances in which other maintenance crews worked in the EFV units). Indeed, plaintiff asserts
3 that an SCCC officer told him that they were “following Rohrer’s directives to always strip
4 search us [the custodial crew] no matter what.” Dkt. 83, at 6. Plaintiff argues that racial animus
5 motivated Rohrer and that work order records show that even though other crews entered the
6 EFV units predictably and regularly, it was only the custodial crew who were targeted for strip
7 searches. *See* Dkt. 83-1. Moreover, most of the strip searches were not documented in
8 accordance with DOC policy (Dkt. 83, at 6), and some staff conducted the strip searches in an
9 inappropriate manner that made the custodial staff feel uncomfortable. Dkt. 86-2, at 5. Plaintiff
10 asserts that he and his coworkers warned Sherwood not to hire another black prisoner onto his
11 crew because that person would be harassed and targeted—as plaintiff and his coworkers had
12 been. *See* Dkt 86-2, at 22.

13 Plaintiff also provides evidence that Rohrer’s mistreatment went beyond the strip
14 searches. According to plaintiff, Rohrer’s adverse actions against him beginning January 22,
15 2016, constituted retaliation for plaintiff’s complaints. Plaintiff asserts that he was not disruptive
16 when discussing his lunch on January 22, 2016, and that Rohrer yelled in his face, called him a
17 liar, told him to “shut up,” and, when plaintiff said he would seek another job, told plaintiff, “I
18 don’t want your Black ass here anyway.” Dkt. 83, at 9. Plaintiff states that he told Rohrer he
19 would file a complaint against him, prompting Rohrer to say that plaintiff was suspended and
20 would be escorted back to his unit. Dkt. 83, at 9.

21 Plaintiff denies ever being out of bounds and states that DOC’s system contains no
22 negative behavior reports about his actions in the HUB area. Dkt. 83, at 9. Plaintiff states that
23 on January 26, 2016, he had permission to deliver chemicals to the kitchen area and that an
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1 employee authorized him to discuss his diet lunch with her. Dkt. 83, at 10. Plaintiff states that
2 he also had authorization to enter the T-building that day, where he spoke with a job coordinator
3 about his position. Dkt. 83, at 10.

4 Plaintiff provides his January 26, 2016, grievance about Rohrer's and McCandless'
5 alleged racially based harassment of him and his letter to Superintendent Gilbert. *See* Dkt. 83-
6 10, at 2; Dkt. 86-18. According to plaintiff, after Rohrer learned of the grievance that plaintiff
7 had filed, Rohrer sought plaintiff out to say that Rohrer "wasn't too happy" with plaintiff's
8 grievance and that plaintiff "shouldn't be working in the CI chair shop." Dkt. 83, at 11. Plaintiff
9 states that subsequently, Rohrer directed his suspension from the chair shop position. Dkt. 86-2,
10 at 20. Plaintiff also states that McCandless targeted plaintiff and the custodial crew, including
11 taking their safety glasses and gloves while allowing white offenders to retain gloves and
12 glasses. *See* Dkt. 83, at 14.

13 Plaintiff denies ever knowingly lying, taking contraband from the HUB area, or taking
14 his lunch out of the HUB area without permission and relies on evidence that the Facility Risk
15 Management Team declined to terminate plaintiff from his employment, despite Rohrer's claims.
16 Dkt. 83, at 10; Dkt. 86-6, at 5. The grievance coordinator testified that Rohrer had failed to
17 properly document his concerns about plaintiff and that in fact, it appeared that plaintiff had
18 permission to take his lunch through the HUB in April 2016 and that Rohrer had given no
19 justification to terminate plaintiff. *See* Dkt. 86-6, at 3-4. Indeed, the grievance coordinator
20 specifically testified that he had concerns about Rohrer retaliating against plaintiff. Dkt. 86-6, at
21 6.

22 Plaintiff also points to Sherwood's testimony that when Rohrer found out that Hunter was
23 being re-hired on the custodial crew, issues with Rohrer escalated. Dkt. 86-3, at 14. Rohrer
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1 confronted Sherwood and accused him of not being “blue”—that is, “not backing” Rohrer “up.”
 2 Dkt. 86-3, at 14. Rohrer emailed Sherwood and others to express his “total disagreement” and
 3 recommendation that plaintiff no longer work in the HUB. Dkt. 86-23, at 2. In response, Chris
 4 Idso stated that he saw “no infractions recently or any related to [plaintiff’s] HUB employment”
 5 and “no behavior log entries that would concern me about employing him in maintenance.” Dkt.
 6 86-24, at 2.

7 In April 2016, plaintiff filed a grievance against Rohrer, accusing him of retaliation and
 8 requesting an investigation. Dkt. 83-15, at 2. Plaintiff states that the grievance coordinator told
 9 him that the grievances would be handled by Superintendent Gilbert. *See* Dkt. 83, at 14.
 10 Plaintiff asserts that the grievance coordinator specifically told plaintiff that there was “nothing
 11 further” he could do, including no possible appeal. Dkt. 83, at 14. Plaintiff states that he did not
 12 learn about the results of Gilbert’s investigation until he had already brought this case. Dkt. 86-
 13 2, at 24.

14 DISCUSSION

15 I. Motion to Strike

16 Defendants include as part of their reply in support of summary judgment a motion to
 17 strike certain evidence that plaintiff relies on. *See* Dkt. 87, at 2–3. The motion to strike is
 18 granted in part and denied in part, as set forth below.

19 An affidavit or declaration “must be made on personal knowledge, set out facts that
 20 would be admissible in evidence, and show that the affiant or declarant is competent to testify on
 21 the matters stated.” Fed. R. Civ. P. 56(c)(4). “A party may object that the material cited to
 22 support or dispute a fact cannot be presented in a form that would be admissible in evidence.”
 23 Fed. R. Civ. P. 56(c)(2).
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1 Defendants argue that plaintiff cannot interpret the work orders. *See* Dkt. 87, at 2.
2 Plaintiff has personal knowledge of what he “witnessed” regarding other work crews, so that the
3 Court declines to strike his testimony about the frequency and predictability of others’ access to
4 the EFV units. *See* Dkt. 83, at 2–3. The Court does not rely on plaintiff’s interpretation of the
5 work orders, however, so that the Court declines to rule on the admissibility of plaintiff’s
6 summary thereof.

7 Defendants appear to object to plaintiff’s account of his interaction with Rohrer on
8 January 26, 2016 (*see* Dkt. 87, at 2) but do not specifically explain why. The Court declines to
9 strike this portion of plaintiff’s declaration.

10 Defendants object to plaintiff’s claim that he has seen statements from Rohrer that he
11 directed Morgan to get plaintiff removed from his chair shop job. *See* Dkt. 87, at 2; *see also* Dkt.
12 83, at 12. The Court grants the motion to strike because plaintiff fails to specifically identify the
13 document that he is referencing. However, the Court notes that plaintiff testified in his
14 deposition that Rohrer directed plaintiff’s suspension. *See* Dkt. 86-2, at 20.

15 Defendants object to plaintiff’s recounting conversations with Dahne, the grievance
16 coordinator. *See* Dkt. 87, at 2; *see also* Dkt. 83, at 14. However, the Court is unconvinced that
17 plaintiff could not provide this evidence at trial in a non-hearsay manner. The Court declines to
18 strike the evidence at this time.

19 Defendants also argue that plaintiff has failed to show the relevance of Doug Baldwin’s
20 deposition testimony about unspecified SCCC supervisors who only hired “white guys” because
21 this is irrelevant and improper character evidence. Dkt. 87, at 3. The Court agrees that it is not
22 clear whom the deposition testimony refers to and therefore does not rely on this evidence.
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1 Notably, however, Sherwood himself testified that other offender crews did not include “black
2 inmates on them.” Dkt. 86-3, at 21.

3 Defendants argue that the Court should strike Baldwin’s references to the “white
4 supremacy set” in the SCCC as improper lay opinion, based on speculation, and improper
5 character evidence. Dkt. 87, at 3. This is a reference to Baldwin’s statements that McCandless
6 and Rohrer were part of the “white supremacy set” at SCCC based on their racially charged
7 views. *See* Dkt. 86-1, at 7. Federal Rule of Evidence 404(a)(1) forbids the use of evidence “of a
8 person’s character or character trait . . . to prove that on a particular occasion the person acted in
9 accordance with the character or trait.” Therefore, the Court considers this evidence only to the
10 extent that Baldwin testified that Rohrer and McCandless made comments to Baldwin that
11 indicated that McCandless and Rohrer disapproved of Sherwood hiring an all-black crew—
12 which is not improper character evidence, does not rely on specialized knowledge, and is not
13 founded on speculation.

14 Defendants also argue that plaintiff cannot make statements about other offenders’
15 experiences with Rohrer and about Morgan’s impression of plaintiff’s work and cannot rely on
16 interview summaries. *See* Dkt. 87, at 3. The Court declines to rule on these arguments because
17 the Court has not relied on any of these materials when issuing this report and recommendation.

18 **II. Summary Judgment Legal Standard**

19 Summary judgment is appropriate if a moving party shows that “there is no genuine
20 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
21 R. Civ. P. 56(a). The materiality of a given fact is determined by the required elements of the
22 substantive law under which the claims are brought. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). Factual disputes that do not affect the outcome of the suit under the governing law will not be considered. *Id.*

Where there is a complete failure of proof concerning an essential element of the non-moving party's case on which the nonmoving party has the burden of proof, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson*, 477 U.S. at 254 ("the judge must view the evidence presented through the prism of the substantive evidentiary burden"). However, when presented with a motion for summary judgment, the court shall review the pleadings and evidence in the light most favorable to the nonmoving party, *Anderson*, 477 U.S. at 255 (citation omitted).

Once the moving party has carried its burden under Fed. R. Civ. P. 56, the party opposing the motion must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The opposing party cannot rest solely on his pleadings but must produce significant, probative evidence in the form of affidavits, and/or admissible discovery material that would allow a reasonable jury to find in his favor. *Id.* at n.11; *Anderson*, 477 U.S. at 249–50. However, weighing of evidence and drawing legitimate inferences from facts are jury functions, and not the function of the court. *See United Steel Workers of Am. v. Phelps Dodge Corps.*, 865 F.2d 1539, 1542 (9th Cir. 1989).

III. Stipulated Dismissals

As noted above, the parties have stipulated to dismiss the claims against Superintendent Gilbert without prejudice. Dkt. 81. And in his response to the summary judgment motion, plaintiff concedes that (1) he is not bringing any retaliation claim against McCandless (Dkt. 82,

1 at 17 n.7) and (2) his Eighth Amendment and Due Process claims should be dismissed. Dkt. 82,
2 at 24.

3 Therefore, the District Court should accept the concessions and dismiss claims against
4 Gilbert without prejudice and claims under the Eighth Amendment and for violation of Due
5 Process with prejudice. The remaining claims are against Rohrer and McCandless for violation
6 of the Fourth Amendment and Equal Protection and against Rohrer for retaliation. Those claims
7 are considered below.

8 **IV. Exhaustion**

9 Defendants argue that plaintiff failed to exhaust his claims related to McCandless'
10 confiscating equipment from the custodial crew and failed to exhaust any of his retaliation
11 claims. *See* Dkt. 72, at 8–10. They argue that the only properly exhausted claims are against
12 Rohrer for violation of Equal Protection. Dkt. 72, at 8.

13 The Court first addresses exhaustion of the claims against Rohrer, then turns to
14 exhaustion of the claims against McCandless.

15 **A. Exhaustion of the Claims against Rohrer**

16 **1. Parties' Evidence**

17 In support of the summary judgment motion, DOC employee Jordan McKinney states
18 that plaintiff filed three grievances related to this lawsuit while he was housed at SCCC. *See*
19 Dkt. 77, at 2–3.

20 First, on January 26, 2016, plaintiff signed a grievance stating that defendants Rohrer and
21 McCandless were harassing him based on his race, noting, among other incidents, that Rohrer
22 had recently suspended plaintiff and said that he was a security threat. Dkt. 77-6, at 17. D.
23 Dahne, the grievance coordinator assigned to this grievance, replied on May 3, 2016, that
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1 plaintiff's suspension had been lifted and he had been hired to the chair shop. Dkt. 77-6, at 2.
2 Dahne recognized that "other issues have come up" and that Rohrer had again suspended
3 plaintiff, who returned to working on the custodial crew. Dkt. 77-6, at 2. Dahne stated that
4 plaintiff had acknowledged receiving a letter from Superintendent Gilbert "assuring [plaintiff]
5 that her and the facility Captain would monitor and investigate this situation further" (*see* Dkt.
6 77-8, at 11) and that plaintiff had indicated "that this was an acceptable resolution at this time."
7 Dkt. 77-6, at 2.

8 On January 27, 2016, plaintiff also signed a grievance stating that he had peanut butter
9 for lunch despite needing a peanut-free diet. Dkt. 77-7, at 2, 8. Dahne wrote back to plaintiff on
10 March 17, 2016, that there had been a "misunderstanding" but that the issue had been addressed.
11 Dkt. 77-7, at 2.

12 On April 16, 2016, plaintiff signed a grievance stating that Rohrer had plaintiff removed
13 from his correctional industries job and terminated as retaliation for plaintiff's pending
14 grievances against him, specifically stating that Rohrer was "out to remove me [plaintiff] from
15 the HUB for my prior complaints about him." Dkt. 77-8, at 2, 12. Dahne responded on May 3,
16 2016, that plaintiff's complaint was investigated, the termination was not supported, and plaintiff
17 was returned to his previous job. Dkt. 77-8, at 2. Again, Dahne referred to plaintiff's letter from
18 superintendent Gilbert (Dkt. 77-8, at 11) and stated that plaintiff indicated that he had received
19 "an acceptable resolution at this time." Dkt. 77-8, at 2.

20 For his part, plaintiff relies on his own deposition testimony that he filed two of these
21 grievances about the issues underlying his lawsuit and that he also wrote a letter to
22 Superintendent Gilbert on the same day as his first grievance. *See* Dkt. 86-2, at 23. Plaintiff
23 understood that Dahne was investigating both grievances and that Dahne told plaintiff that
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1 Dahne was “really not authorized to investigate other staff members concerning official
 2 misconduct.” Dkt. 86-2, at 23. Plaintiff stated that he showed Dahne the letter to Gilbert and
 3 that Dahne and plaintiff “decided to let Ms. Gilbert take over from there and respond to the
 4 retaliation, the racial discrimination, all that stuff . . . ‘cause he felt like she could do a better job
 5 than he could[.]” Dkt. 86-2, at 24.

6 Plaintiff states that he subsequently complained to Dahne that he was not receiving any
 7 response from Superintendent Gilbert and was concerned about timely exhausting his grievances.
 8 Dkt. 86-2, at 24. Plaintiff states that Dahne told plaintiff he had to wait and that he could not
 9 appeal. Dkt. 86-2, at 24. According to plaintiff, the first time that he learned the investigation
 10 had closed and that there had been a finding that the allegations were unfounded was after
 11 initiating the lawsuit. *See* Dkt. 86-2, at 24.

12 **2. Discussion**

13 A portion of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that “[n]o
 14 action shall be brought with respect to prison conditions under section 1983 . . . or any other
 15 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such
 16 administrative remedies as are available are exhausted.”

17 Here, plaintiff filed grievances related to Rohrer and McCandless allegedly harassing him
 18 based on his race and Rohrer retaliating against him for filing the racial discrimination grievance.
 19 Clearly, plaintiff’s April 16, 2016 grievance, in which he specifically stated that he thought
 20 Rohrer was trying to get him removed from the HUB as a result of plaintiff’s prior complaints
 21 against Rohrer, put prison officials on notice of plaintiff’s retaliation claim against Rohrer. *See*
 22 Dkt. 77-8, at 3.

Defendants argue that plaintiff failed to complete the process of exhausting the April 16 grievance. *See* Dkt. 72, at 10. They point to Dahne’s written statements that plaintiff indicated that Gilbert’s letter assuring plaintiff she would monitor and investigate the situation was an acceptable resolution. *See* Dkt. 77-8, at 2. And they argue that plaintiff failed to properly exhaust his grievance by appealing it, “cho[osing] not to pursue it further through the grievance program.” Dkt. 72, at 10.

But where a prisoner failed to timely exhaust administrative remedies due to an administrator’s mistake, that failure to exhaust is excused. *Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010). And a prisoner is no longer obligated to exhaust if he is reliably informed by an administrator that there are no remedies available. *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005). Taking plaintiff’s statements as true—as the Court must on summary judgment—plaintiff was told by Dahne that plaintiff had to wait and could not appeal his grievances while Gilbert’s investigation was ongoing. Dkt. 86-2, at 24. Plaintiff did not learn before initiating the lawsuit that the investigation had ended. *See* Dkt. 86-2, at 24. Therefore, plaintiff has created genuine factual issues material to whether he is excused from exhausting his grievance about retaliation, and the matter is not appropriate for resolution on summary judgment. Defendants’ arguments to the contrary (*see* Dkt. 87, at 8–9) are not persuasive.

Moreover, the Court observes that defendants do not specifically address why the Fourth Amendment claim against defendant Rohrer would be unexhausted. *See* Dkt. 72, at 8–11. The Court declines to manufacture such an argument for defendants. The District Court should disagree that plaintiff’s Fourth Amendment, retaliation, or Equal Protection claims against Rohrer should be dismissed on the basis of a failure to exhaust.

B. Claims against McCandless

1 As noted above, plaintiff brings only Equal Protection and Fourth Amendment claims
2 against McCandless. *Supra* part III. Defendants argue that plaintiff has failed to exhaust any
3 claim related to McCandless' alleged confiscation of equipment and has exhausted only
4 allegations related to the strip searches. *See* Dkt. 87, at 3.

5 Plaintiff claims that McCandless confiscated fingerless gloves from plaintiff but allowed
6 another, white worker to keep identical gloves. *See* Dkt. 83, at 13–14. In addition, plaintiff
7 states that McCandless took plaintiff's and plaintiff's coworkers' safety glasses even though
8 other workers were allowed to use such glasses. Dkt. 83, at 14. Neither of plaintiff's grievances
9 refer to these alleged events. *See* Dkt. 77-6, at 2; Dkt. 77-8, at 2. Although the timing of alleged
10 events is somewhat unclear, the glove incident appears to have occurred in early June 2016, well
11 after plaintiff had filed the two grievances noted above and written a letter to Superintendent
12 Gilbert. *See* Dkt. 32, at 3.

13 The Court is not aware of any Ninth Circuit authority requiring that plaintiff, having
14 already complained of McCandless' alleged racial harassment of him "because [he is] Black,"
15 had to file a separate grievance or make a separate complaint every time that McCandless again
16 engaged in such actions. Although the Ninth Circuit has not spoken on this issue, other circuit
17 courts have held that prisoners "need not file multiple, successive grievances raising the same
18 issue . . . if the objectionable condition is continuing." *Turley v. Rednour*, 729 F.3d 645, 649
19 (7th Cir. 2013); *see also Johnson v. Killian*, 680 F.3d 234, 238 (2d Cir. 2012) (per curiam)
20 (holding that a prisoner's 2005 grievance "provided the administration with notice of, and an
21 opportunity to resolve the same problem that would continue intermittently through 2007" and
22 therefore, the claim was sufficiently exhausted); *Parzyck v. Prison Health Servs., Inc.*, 627 F.3d
23 1215, 1219 (11th Cir. 2010) (holding that a prisoner was "not required to initiate another round
24

1 of the administrative grievance process on the exact same issue each time” an alleged deprivation
 2 of rights occurred); *Howard v. Waide*, 534 F.3d 1227, 1244 (10th Cir. 2008) (a prisoner was “not
 3 required to begin the grievance process anew . . . [because] further grievances complaining of the
 4 same living situation would have been redundant.”); *Johnson v. Johnson*, 385 F.3d 503, 521 (5th
 5 Cir. 2004) (“As a practical matter, Johnson could not have been expected to file a new
 6 grievance . . . each time he was assaulted . . . Johnson’s grievances were sufficient to exhaust
 7 claims that arose from the same continuing failure to protect him from sexual assault.”).

8 Plaintiff signed a grievance in January 2016 complaining that he was being subjected to
 9 racially motivated harassment by Rohrer and McCandless, and at least one incident of equipment
 10 confiscation allegedly occurred after plaintiff did so. The record is unclear regarding the timing
 11 of all the incidents. The Court is not persuaded that plaintiff needed to file a new grievance at
 12 the time of each alleged instance of discrimination. Rather, his claims against McCandless in
 13 2016, taking the evidence in the light most favorable to plaintiff, were adequate to put prison
 14 officials on notice of the problem for which plaintiff sought redress. *See Sapp v. Kimbrell*, 623
 15 F.3d 813, 824 (9th Cir. 2010). Although plaintiff did not appeal his January 2016 grievance, as
 16 noted above, plaintiff has raised genuine issues of fact regarding whether he is excused from
 17 exhaustion because Dahne’s statements led plaintiff to believe that no further actions were
 18 available regarding plaintiff’s grievances against McCandless and Rohrer. Similarly, to the
 19 extent that plaintiff is bringing a separate claim against Rohrer for forcing the custodial crew
 20 (and not other, white crews) to wear high visibility vests, viewed in the light most favorable to
 21 plaintiff, the evidence supports that he exhausted this claim by bringing a grievance against
 22 Rohrer for racial discrimination.

23 In short, defendants’ arguments regarding exhaustion are unavailing.
 24

V. Equal Protection Claim against Rohrer

Defendants argue that plaintiff's Equal Protection claim against defendant Rohrer should be dismissed on summary judgment. Dkt. 72, at 12–18. The Court disagrees for the reasons set forth below.

A. Similarly Situated Group

Defendants argue that relevant to the strip searches, plaintiff has not identified a similarly situated comparison group. *See* Dkt. 72, at 13. They point to evidence that the custodial crew, which was subject to the strip searches was “uniquely situated in its ability to coordinate and introduce contraband.” Dkt. 72, at 12–13. The Court finds that plaintiff has created factual issues regarding whether other prisoners who were not strip searched were similarly situated to the custodial crew in relevant aspects.

1. Legal Principles

“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). With Equal Protection claims, then, the “first step . . . is to identify the state’s classification of groups” and then “look for a control group . . . composed of individuals who are similarly situated to those in the classified group in respects that are relevant to the state’s challenged policy.” *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018) (citations omitted); *see also Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014) (“The groups need not be similar in all respects, but they must be similar in those respects relevant to the Defendants’ policy.”).

2. Parties' Evidence

Defendants rely on Eric Mainio's (the SCCC's Correctional Captain) declaration, including that the EFV units are historically a means for contraband to be smuggled into SCCC. Dkt. 73, at 1. As noted, defendants have also provided evidence that in 2014, a custodial worker in the EFV units was caught smuggling drugs into the EFV units and appears to have implicated the janitorial team as smuggling contraband into the facility. Dkt. 29, at 2; Dkt. 74, at 178. Mainio points out that prisoners who clean visitation rooms, the intensive management unit, maximum custody units, and medical units are also strip searched. Dkt. 73, at 4.

Mainio states that the "crew who cleaned the EFV units has the unique ability to coordinate and introduce contraband into the facility" due to "the regularity of their access to the EFV units" and "the challenges in keeping direct supervision of the individuals on this crew." Dkt. 73, at 3; *see also* Dkt. 74-4, at 12 (noting that a custodial crew supervisor could not constantly watch prisoners cleaning the EFV units). Predictability is key to contraband drops, according to Mainio, because otherwise "it will not be known when or who will have access to the drop area at what time." Dkt. 73, at 3. Defendants also rely on Mark Sherwood's and plaintiff's deposition testimony that the custodial crew cleaned EFV units weekly, at least once and sometimes twice. Dkt. 74-2, at 4; Dkt. 74-3, at 4. McCandless testified that the custodial team entered the EFV units "right after they empty the EFVs" and that unlike the carpenter, electrician, and plumbing crews, the custodial crew had a set pattern of entering the EFV units and one could predict which custodial crew member would be "going out" to the units. Dkt. 74-1, at 6.

Defendants also point to evidence that in contrast to the custodial crew, other work crews performed work on an unpredictable basis and did not necessarily include prisoner workers. *See*

Dkt. 72, at 13. McCandless testified that the carpenter, electrician, and plumbing crews did not go out on a set pattern and it was unpredictable which incarcerated worker would be in the EFV units. *See* Dkt. 74-1, at 6. Indeed, plaintiff himself acknowledged that other crews only went out to the EFV units “as needed.” Dkt. 30-1, at 11.

In response, plaintiff asserts that there is evidence that SCCC facility maintenance had regular access to EFV units—accessing the units even more frequently than the custodial crew—yet were not strip searched. *See* Dkt. 82, at 19–20 (citing Dkts. 86-27 (maintenance crew work orders) as showing that the custodial crew entered the units 60 times, while the construction maintenance crew entered the units 95 times). Work orders for preventative and routine work performed from 2014 to 2016 show that other facility maintenance crews entered EFV units regularly and sometimes more often than the custodial crew. *See* Dkt. 75, at 2; Dkt. 75-1. And plaintiff relies on a staff member’s statement that preventative maintenance occurs on regular intervals and that mundane day-to-day sanitation tasks and “other automatic tasks” are not recorded at all. *See* Dkt. 75, at 2.

3. Discussion

As noted, defendants have come forward with evidence that multiple factors—predictability and frequency of access, scope of work, lack of direct supervision, and predictability of which prisoners would be present—rendered the custodial crew unique from other crews entering the EFV units, who were not strip searched. Defendants argue that the custodial crew uniquely accessed EFV units with limited supervision after the public used those units and it was predictable who would be in the EFV units. *See* Dkt. 87, at 5.

Crucially, however, plaintiff has created genuine factual issues regarding whether the factors that defendants rely on are truly unique. For instance, defendants argue that the custodial

1 crew is unique because they were often out of their supervisor's line of sight. But plaintiff states
2 that he is not aware of ever leaving his supervisor's direct line of sight while working in the EFV
3 units. *See* Dkt. 83, at 5. And defendants argue that the custodial crew was uniquely in the EFV
4 units right after visitations. But plaintiff states that the custodial crew did not enter EFV units
5 until the day after a visit, by which time an officer had searched the unit for contraband. Dkt. 83,
6 at 5. Thus, the Court finds factual issues regarding whether or not plaintiff has identified other,
7 similarly situated groups that were treated differently based on race—notwithstanding
8 defendants' argument to the contrary.

9 Moreover, as plaintiff points out, DOC records showing monthly hot water temperature
10 checks (*e.g.* Dkt. 75-1, at 36) and fire extinguisher inspections (*e.g.* Dkt. 75-1, at 46); quarterly
11 heat system checks (*e.g.* Dkt. 75-1, at 3); and annual fire extinguisher inspections (*e.g.* Dkt. 75-1,
12 at 4), vent cover maintenance (*e.g.* Dkt. 75-1, at 23), and smoke detector battery changes (*e.g.*
13 Dkt. 75-1, at 34) completed by crews other than the custodial crew. There also appear to be
14 other regular activities performed in the EFV units related to daily sanitation and garbage pickup.
15 Dkt. 75, at 2. Plaintiff states in his declaration that these other crews entered the EFV units on a
16 "regular and predictable basis." Dkt. 83, at 2. Presumably, this is based on plaintiff's own
17 observations, so that the Court declines to ignore the statement as requested by defendants. *See*
18 Dkt. 87, at 5. Therefore, there are factual issues regarding whether the custodial crew was being
19 treated differently simply because they were accessing the EFV units on a predictable basis.

20 In short, the Court finds that genuine factual issues prevent summary judgment dismissal
21 of the Equal Protection Claims related to the strip searches on the basis that plaintiff has not
22 identified a similarly situated comparison group.

23 **B. Motivation for Strip Searches**

24

Defendants alternatively argue that the Equal Protection claims related to the strip searches should be dismissed on summary judgment because plaintiff has failed to provide evidence that the strip search policy was pretext for racial discrimination. *See* Dkt. 72, at 14.

1. Defendants' Evidence

Defendants rely on Rohrer's description of the strip search policy's inception as showing a lack of pretext—

After it was discovered that drugs were entering the facility through the EFVs by the custodial crew in 2013 or 2014, Captain Davis ordered that the custodial crew be strip searched after they finish cleaning the EFVs as an additional security measure. On November 4, 2014, Facility Manager Chris Idso sent an email conveying this order. The email said, “. . . it is the expectation that offenders working in EFV's in a semi-supervised capacity will be strip searched when they are done. Semi-supervised means any offender that leaves the direct line of site of his/her supervisor. Under this definition, it will always mean the porter crews.”. . . . After receiving this directive from Captain Davis, on November 4, 2014, I sent an email to staff reiterating Captain Davis's order regarding the strip searches and my initial thoughts on how they should be implemented. On November 5, 2014, I sent a follow-up email to staff with additional thoughts on how the strip searches should be implemented.

Dkt. 31, at 2–3; *see also* Dkt. 83-3, at 2. Rohrer's November 4, 2014, email states that “all EFV cleaning crews will be searched before leaving the EFV unit being cleaned.” Dkt. 83-4, at 2.

Rohrer also states that he had “no idea” of the custodial crew's racial composition and denies asking Sherwood about the race of his crew. *See* Dkt. 74-4, at 14–15. Defendants also cite to evidence noted above that the custodial crew was uniquely poised to smuggle contraband from the EFV units and had, in fact, been implicated in such smuggling. *See* Dkt. 72, at 16. In addition, defendants assert that the custodial crew was not “primarily black” and that “both black and non-black members of the custodial crew were strip searched when leaving the EFV unit.” Dkt. 74, at 16.

2. Plaintiff's Evidence

For his part, plaintiff argues that there is evidence that Rohrer “took it upon himself to order strip searches of only the all-Black custodial team,” even though Idso requested a policy that would result in strip searches of all “porter crews” who accessed the EFV units. *See* Dkt. 82, at 21. Plaintiff states that “all porter crews” means “*all* facility maintenance crews”—mechanical, maintenance, and construction crews, and not just custodial crews such as plaintiff’s. *See* Dkt. 83, at 5. Moreover, plaintiff points to SCCC’s own 2019 investigation report, stating that interviews with Rohrer and Idso verified that the custodial crew “was the only crew that were getting strip[] searched each time they go into the EFV[s].” Dkt. 86-13, at 3.

Plaintiff also points to evidence that Rohrer implemented the strip search policy only after Sherwood began hiring black custodial crew employees. *See* Dkt. 82, at 21. Sherwood testified that in July 2014, he took over the custodial supervisor position in the HUB (Dkt. 86-3, at 9) and that shortly thereafter, McCandless inquired about why he was “hiring all these blacks[?]” Dkt. 86-3, at 7–8. Sherwood states that to the best of his recollection, his was the only crew with black prisoners in the engineering shop. Dkt. 86-3, at 21. In addition, plaintiff provides testimony from multiple people who recall Rohrer making racially charged statements or using racial epithets to describe the custodial crew and that Rohrer appeared to unfairly target the custodial crew. *See* Dkt. 84, at 2–3; Dkt. 86-1, at 7; Dkt. 86-3, at 7–8.

3. Discussion

Defendants assert that Rohrer was following Idso’s direction to strip search the porter crews. But plaintiff’s testimony that “porter crews” incorporated other crews, together with evidence that only the custodial crews were searched and that Rohrer expressed racial animus

1 toward the custodial crew, creates genuine issues of material fact regarding whether Rohrer in
2 fact used the strip search policy as pretext to harass the primarily black custodial crew.

3 The Court is aware that defendants have provided evidence that the custodial crew was
4 uniquely found to have been smuggling contraband into the facility. *See* Dkt. 72, at 15 (citing
5 evidence). Rohrer’s deposition testimony supports the conclusion that the entire crew was
6 suspected—not just one custodial crew member who had been caught smuggling contraband.
7 Dkt. 74-4, at 7; *see also* Dkt. 86-5, at 4 (“ . . . the drugs [were] still coming in.”). Nonetheless,
8 the District Court, having reviewed the prior Report and Recommendation, specifically stated
9 that “[i]t seems irrational to only mandate strip searches of the previous crew that was implicated
10 in the wrong doing if other crews could potentially smuggle drugs in the exact same manner.”
11 Dkt. 45, at 2. In addition, plaintiff has now pointed to specific evidence in the record tending to
12 support that in fact, the custodial crew was similarly situated to other, white crews that accessed
13 the EFV units yet were not searched. The Court is not inclined to recommend summary
14 judgment dismissal in light of the District Court’s statement and this evidence.

15 Defendants argue that the custodial crew was not “all-black” and that “the employment
16 records for November 2014 to June 2017 . . . irrefutably show that there were 19 individuals who
17 served on the custodial crew at various times and 10 self-identified as ‘black,’ leaving the
18 remaining nine members as non-Black.” Dkt. 87, at 6. But plaintiff has come forward with
19 evidence that Sherwood uniquely hired black workers and that other crews did not do so. *See*
20 Dkt. 86-3, at 21. Moreover, plaintiff relies on Sherwood’s own statements that McCandless and
21 Rohrer referenced the racial composition of Sherwood’s hires. *See* Dkt. 86-3, at 8; *see also* Dkt.
22 86-1, at 7 (Baldwin’s testimony that Rohrer also made comments about Sherwood’s hiring
23 practices). Even if the custodial crew was not uniformly composed of only offenders of one
24

1 race, plaintiff's evidence that it was primarily (and uniquely) composed of black prisoners
2 supports an inference of racial animus.

3 Similarly, plaintiff and defendants dispute whether a "porter" describes only a custodial
4 worker or workers from other crews, and this dispute again merits denial of the summary
5 judgment motion. Dkt. 87, at 7; *see also* Dkt. 86-3, at 16 (describing "porters" in other contexts
6 than on the custodial crew).

7 Defendants also argue that Rohrer was, according to his deposition testimony, not aware
8 of the racial composition of the custodial crew at the time of his actions regarding the strip
9 search policy's implementation—so that racial animus could not have motivated Rohrer. *See*
10 Dkt. 87, at 7. But Sherwood states that he started hiring black offenders (eliciting a comment
11 from McCandless about the race of the new custodial crew hires) shortly after he was hired in
12 July 2014—creating a reasonable inference that the strip search policy's implementation in
13 November 2014 came after Sherwood's hiring practices had already begun. *See* Dkt. 86-3, at 7;
14 *but see* Dkt. 86-5, at 3–4 (Rohrer claims that Sherwood started after the strip searches began).
15 Moreover, although Sherwood could not recall the date of Rohrer's own alleged comment on
16 Sherwood's hiring practices, this does not merit summary judgment dismissal, but instead
17 illustrates factual issues regarding whether and when Rohrer allegedly became aware of
18 Sherwood's hiring practices. *See* Dkt. 86-3, at 8. The Court notes that Sherwood stated that
19 Rohrer was his direct supervisor and that Rohrer and McCandless "work[ed] right next to each
20 other" and were talking "all the time." Dkt. 86-3, at 8. The Court is unable to say, on this
21 record, that there is no genuine dispute that Rohrer was unaware of the racial composition of the
22 custodial crew.

1 Nor is the Court convinced by defendants' arguments that strip searches of both black
 2 and non-black custodial crews show that, as matter of law, the strip search policy was not pretext
 3 for racial discrimination. Even if custodial crew members of both races were strip searched,
 4 disproportionately targeting a primarily black crew for strip searches while declining to search
 5 non-black crews could support such a claim, particularly in the context of the alleged racial
 6 comments made by Rohrer.

7 Defendants also point to evidence that other prisoners who had access to high security
 8 areas were strip searched. *See* Dkt. 87, at 8. However, even if other custodial crews were strip
 9 searched regardless of race, a fact finder could still find from plaintiff's evidence that Rohrer
 10 applied the strip search policy within the HUB as a means to racially discriminate against the
 11 primarily black custodial crew.

12 The District Court should decline to grant summary judgment dismissal of the claims
 13 against defendant Rohrer for violation of Equal Protection.

14 **VI. Fourth Amendment Claims against Rohrer**

15 Plaintiff alleges that Rohrer violated the Fourth Amendment because there was no valid
 16 penological justification for the strip search policy and because it resulted in unreasonable strip
 17 searches of the custodial crew on a routine basis. *See* Dkt. 67, at 14. Regarding this claim
 18 against Rohrer, defendants argue that the strip search policy was permissible under the Fourth
 19 Amendment and that to the extent that individual searches were unreasonable and harassing,
 20 plaintiff has failed to show that Rohrer participated in the searches. *See* Dkt. 72, at 19–20.

21 “[T]he Fourth Amendment . . . appl[ies] to the invasion of bodily privacy in prisons.”
 22 *Bull v. City & Cty. of S.F.*, 595 F.3d 964, 974–75 (9th Cir. 2010). “Whether a search is
 23 reasonable under the Fourth Amendment requires a case-by-case ‘balancing of the need for the
 24

particular search against the invasion of personal rights that the search entails.” *Byrd v. Maricopa Cty. Sheriff’s Dep’t*, 629 F.3d 1135, 1141 (9th Cir. 2011) (quoting *Bell*, 441 U.S. 520, 559 (1979)). “The required factors for courts to consider include: (1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating it, and (4) the place in which it is conducted.” *Id.* (internal quotation marks and citation omitted).

A. Parties’ Evidence

As noted above, plaintiff points to evidence that other facility maintenance members were in the EFV units even more often than his custodial crew, including for daily sanitation, and plaintiff states that he observed regular and predictable access by other crews. *See* Dkt. 75, at 2; Dkt. 83, at 2; Dkt. 83-1. And plaintiff disputes that the custodial crew entered EFV units right after visitations or was out of their supervisor’s site. *See* Dkt. 83, at 5.

Moreover, plaintiff asserts that the strip searches were not conducted consistent with DOC policy. *See* Dkt. 82, at 8. DOC policy 420.310 requires that searches are conducted “in a professional manner . . . and avoiding . . . embarrassment, or indignity to the offender being searched.” Dkt. 83-5, at 3. The policy also requires documentation of each strip search, including the dates, offender names and DOC numbers, reason for the search, and names and genders of employees conducting the search. Dkt. 83-5, at 5. However, plaintiff states that the vast majority of the strip searches were never properly documented (Dkt. 83, at 6; *see also* Dkt. 76-1 (DOC records showing three strip searches of plaintiff); Dkt. 83, at 6 (plaintiff’s declaration that he was subjected to at least 25 strip searches)) and that they were sometimes conducted in an inappropriate and unnecessarily humiliating manner. *See* Dkt. 86-2, at 5. In addition, superintendent Gilbert stated that strip searches were not supposed to be done inside the EFV units. *See* Dkt. 86-4, at 6.

1 **B. Discussion**

2 A routine, mandatory strip search policy may be constitutional. *See Bull*, 595 F.3d at
 3 974. Here, however, plaintiff has provided evidence from which a fact finder could conclude
 4 that Rohrer implemented a policy of strip searching only the custodial crew, without requiring
 5 documentation or that the strip searches be conducted in the appropriate location, as a pretext for
 6 racial discrimination. Plaintiff has come forward with evidence creating factual disputes
 7 material to the manner of the searches, the justifications for them, and the place in which they
 8 were conducted—several of the factors that the Court must consider in assessing the
 9 reasonableness of such a policy. *See Byrd*, 629 F.3d at 1141. For instance, plaintiff alleges that
 10 the strip searches were conducted in the EFV units themselves and without appropriate
 11 documentation and provides Superintendent Gilbert’s testimony that strip searches were
 12 supposed to take place in designated areas and to be documented to avoid the possibility of staff
 13 misconduct. *See* Dkt. 86-4, at 6. Defendants notably provide no argument about why it was
 14 reasonable or necessary to dispense with these requirements. *See* Dkt. 72, at 3–4, 18–20; Dkt.
 15 87, at 12–13. And as noted above, the Court finds factual issues related to whether the policy
 16 was a pretext for racial discrimination. *See supra*, Part V.

17 Defendants argue that plaintiff has not shown that Rohrer directed searches in a manner
 18 that did not comply with DOC or SCCC policy. *See* Dkt. 87, at 12. But Rohrer’s email
 19 specifically directed searching the EFV cleaning crews before they left the unit being cleaned—a
 20 practice that Superintendent Gilbert testified would be improper. *See* Dkt. 83-4, at 2; Dkt. 86-4,
 21 at 6. Rohrer’s email also directs staff to record the names and numbers of those strip searched
 22 but does not require staff to record the search date or reason or the names and genders of the
 23 employees conducting the searches, as required by DOC policy. *See* Dkt. 83-4, at 2; Dkt. 83-5,

1 at 5. In short, there are questions of fact regarding the extent to which Rohrer directed searches
2 that violated DOC and SCCC policy.

3 Finally, defendants argue that plaintiff has failed to provide evidence that defendant
4 Rohrer should be liable for specific instances in which individual officers abused the strip search
5 policy and conducted strip searches in a harassing manner. *See* Dkt. 72, at 19. However,
6 defendant Rohrer testified that he participated in at least some of the searches (Dkt. 86-5, at 5),
7 so that the Court declines to recommend dismissal of claims that Rohrer participated in particular
8 strip searches that were conducted improperly.

9 **VII. Retaliation Claim against Rohrer**

10 Plaintiff asserts that on January 22, 2016, he threatened to file a grievance against
11 defendant Rohrer and that Rohrer then “began a pattern of retaliatory conduct” toward plaintiff,
12 including sending plaintiff back to his unit on January 26, 2016, and attempting to have plaintiff
13 terminated from employment in the HUB. Dkt. 67, at 6; *see* Dkt. 82, at 9–15.

14 **A. Defendants’ Evidence**

15 According to Rohrer, he perceived plaintiff as “an offender [who] seems to find it
16 difficult to follow the rules when the rules do not serve his purposes” and whose “behavior was a
17 cause for concern.” Dkt. 31, at 3. Rohrer states that on January 20, 2016, plaintiff complained
18 about his lunch in the HUB dining hall in an “argumentative and loud” manner, stating that he
19 was allergic to various items, and that Rohrer requested to see plaintiff’s health status report.
20 Dkt. 31, at 3–4.

21 Rohrer states that on January 22, 2016, plaintiff showed Rohrer plaintiff’s health status
22 report, which did not document plaintiff’s claimed allergy to “the black things in the salami[.]”
23 Dkt. 31, at 4. Rohrer states that plaintiff became disruptive and raised his voice toward Rohrer,
24

1 so that Rohrer “sent him back to his unit for the remainder of the day.” Dkt. 31, at 4. Rohrer
2 states that his actions were based on plaintiff’s behavior, not any improper purpose. Dkt. 31, at
3 5.

4 According to Rohrer, on January 26, 2016, plaintiff was “out of bounds” twice. Dkt. 31,
5 at 5. In the morning, plaintiff went to the back of the kitchen, where he was not allowed to be,
6 and spoke to a kitchen staff member about his allergies and dietary requirements. Dkt. 31, at 5–
7 6. The kitchen staff member wrote an incident report stating that plaintiff had lied to her about
8 his diet and whether he had spoken to the food manager. *See* Dkt. 31-1, at 9. Later, according to
9 Rohrer, plaintiff approached a job coordinator in another building to speak to her about obtaining
10 a different job position. Dkt. 31, at 6. The job coordinator emailed Rohrer about the incident
11 (Dkt. 31-1, at 11), and Rohrer states that he then emailed Sherwood, plaintiff’s supervisor, about
12 the incident, as well as contacting other staff about what Rohrer perceived as plaintiff lying and
13 attempting to manipulate staff. Dkt. 31, at 6. Sherwood suspended plaintiff that day, according
14 to Rohrer. Dkt. 31, at 7.

15 According to Rohrer, plaintiff started working in the chair shop, and on April 11, 2016,
16 Rohrer learned that plaintiff had “failed to follow the directive of his supervisor, CI Supervisor
17 Keith Morgan, to report to the HUB Access for a callout, lied to an officer about having approval
18 to pick up a lunch early, and then lied to another officer about having approval to take his lunch
19 through the HUB to the main facility and back in violation of security rules.” Dkt. 31, at 7.
20 Rohrer emailed staff regarding his concerns on April 13, 2016. Dkt. 31, at 7.

21 Finally, on April 20 and 28, 2016, Rohrer emailed staff regarding plaintiff having
22 allegedly been caught lying to additional staff members, bringing contraband food out of the
23 HUB. Dkt. 31, at 7.

B. Plaintiff's Evidence

For his part, plaintiff asserts that on January 20, 2016, Rohrer refused to look up plaintiff's health status report to confirm his allergies, forcing plaintiff to forego his lunch that day. Dkt. 83, at 8. Plaintiff asserts that he was allergic to the peanut products in his lunch box—not the “black things in the salami.” Dkt. 83, at 8. Plaintiff states that on January 22, 2016, he showed Rohrer his medical records documenting his peanut and sunflower allergies. Dkt. 83, at 8. Plaintiff denies that he was loud or disruptive but asserts that Rohrer yelled directly in plaintiff's face and called plaintiff a liar. Dkt. 83, at 8–9. According to plaintiff, when he said he would look for another job, Rohrer replied that he “d[id not] want your Black ass here anyway.” Dkt. 83, at 9. Plaintiff states that he threatened to file a grievance against Rohrer, and that Rohrer then told plaintiff that Rohrer was suspending plaintiff. Dkt. 83, at 9. Rohrer directed another corrections officer to escort plaintiff back to his unit. Dkt. 83, at 9.

Plaintiff also denies that he was ever out of bounds. Dkt. 83, at 9. He states that on the morning of January 26, 2016, he had been authorized to be at the back of the kitchen dock to deliver chemicals. Dkt. 83, at 10. Plaintiff avers that the kitchen worker gave plaintiff permission to speak to her about his special diet lunch. Dkt. 83, at 10. Regarding the incident with the job coordinator, plaintiff states that he had again been authorized to enter the building, to pick up custodial items. Dkt. 83, at 10. He states that he spoke with the job coordinator about potentially working in the chair shop but denies that he lied or manipulated anyone. Dkt. 83, at 10.

Plaintiff states that after Rohrer learned plaintiff had filed the racial harassment grievance, Rohrer confronted plaintiff and “told [plaintiff] that he wasn't too happy with the grievance [plaintiff] wrote and that [plaintiff] shouldn't be working in the CI Chair Shop.” Dkt.

83, at 11. On April 11, 2016, plaintiff asserts that he obtained permission to take his special diet lunch box with him to a call out, denying Rohrer's claim that plaintiff lied to two officers to bring his lunch with him. Dkt. 83, at 12. Plaintiff asserts that he has observed "numerous offenders" take their lunches through HUB in such a manner, with staff permission. Dkt. 83, at 12.

C. Legal Principles and Discussion

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005) (footnote omitted).

Defendants first argue that plaintiff has failed to come forward with evidence that his protected activity was the motivation for the adverse actions that Rohrer took. *See* Dkt. 72, at 22. However, taking plaintiff's evidence as true, Rohrer told plaintiff directly that he was not pleased with plaintiff filing a grievance and that Rohrer thought plaintiff should not be working in the chair shop. *See* Dkt. 83, at 11. Although defendants point out that plaintiff gave contrary testimony in his deposition (*see* Dkt. 86-2, at 23), plaintiff has provided evidence that other staff—the chair shop supervisor and the grievance coordinator—told plaintiff either that "things" had escalated because plaintiff filed the grievance or that Rohrer was upset with plaintiff about the grievance. *See* Dkt. 86, at 34, 38. Taken as true, this raises a reasonable inference that Rohrer had a retaliatory motive toward plaintiff, even setting aside plaintiff's own testimony about Rohrer's statements.

1 Defendants' second argument is that even if plaintiff has shown that Rohrer had a
2 retaliatory motive, plaintiff has not shown the lack of a valid penological goal for Rohrer's
3 actions. Dkt. 72, at 22. Plaintiff bears the burden of showing the absence of legitimate
4 correctional goals for the conduct of which he complains. *Pratt v. Rowland*, 65 F.3d 802, 806
5 (9th Cir. 1995). Nonetheless, "prison officials may not defeat a retaliation claim on summary
6 judgment simply by articulating a general justification for a neutral process, when there is a
7 genuine issue of material fact as to whether the action was taken in retaliation for the exercise of
8 a constitutional right." *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) ("If . . . the defendants
9 abused the gang validation procedure as a cover or a ruse to silence and punish [the prisoner]
10 because he filed grievances, they cannot assert that [his] validation served a valid penological
11 purpose, even though he may have *arguably* ended up where he belonged.").

12 Plaintiff denies that he talked loudly or raised his voice toward Rohrer or that he was
13 disruptive on January 22, 2016. *See* Dkt. 83, at 9. Plaintiff also provides supporting declarations
14 from other prisoners that plaintiff was cooperative with Rohrer about the diet incident and that
15 on January 22, it was Rohrer, not plaintiff, whom prisoners heard yelling. *See* Dkt. 85, at 2.
16 Plaintiff also states that another corrections officer was present during his conversation with the
17 kitchen staff member on January 26, 2014, and that this officer went to Rohrer afterward. *See*
18 Dkt. 86-2, at 11. The Court finds that the corrections officer's going to Rohrer—and not
19 warning plaintiff not to speak with kitchen staff at the time—supports an inference that Rohrer
20 abused the policy about being "out of bounds" as a pretext to retaliate against plaintiff.
21 Moreover, plaintiff has now come forward with evidence that grievance coordinator Dahne
22 asked Rohrer to substantiate his claim that plaintiff was a security risk because Dahne could not
23 find any records to support this conclusion. *See* Dkt. 86-19, at 3 ("His infraction history is good
24

1 and work evaluations are above average.”). Rohrer acknowledged that he had failed to properly
2 document plaintiff’s behaviors regarding his diet. *See* Dkt. 86-19, at 2.

3 Regarding the April 22, 2016, incident with plaintiff taking his lunch from the HUB,
4 plaintiff points to deposition testimony from an SCCC staff member, Ryan Denzer, (*see* Dkt. 86-
5 6, at 4) that Denzer personally confirmed that plaintiff had permission to bring his lunch through
6 the HUB area. *See* Dkt. 86-6, at 4. Indeed, Denzer testified that he had concerns that Rohrer
7 was retaliating against plaintiff. *See* Dkt. 86-6, at 6 (“I’ve got so many e-mails from . . . Mr.
8 Rohrer explaining to me all these alleged things that Mr. Hunter is doing. But I have no
9 documentation to support what he’s saying to me. . . . It just seems like he was just so focused
10 on Mr. Hunter.”).

11 In the Court’s view, this evidence raises triable issues of fact regarding whether Rohrer’s
12 claimed security concerns about plaintiff were pretextual for retaliation.

13 Finally, defendants briefly appear to argue that Rohrer’s actions were too minimal to
14 constitute an adverse action. *See* Dkt. 72, at 23 n.5. The Court disagrees. An adverse action—
15 within the retaliation context—is one that would be sufficient to chill a person of ordinary
16 firmness. *See Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009). The threat of losing
17 paying employment and being labelled a “security threat” is sufficiently serious that it would
18 chill an ordinary person. *See also Klein v. Williams*, 714 Fed. App’x 631, 636 (9th Cir. 2017) (a
19 person of ordinary firmness would be chilled by threat of terminating prison employment).

20 The District Court should not dismiss the retaliation claims against Rohrer on summary
21 judgment.

VIII. Claims against McCandless

As noted, plaintiff's remaining claims against McCandless are for violation of the Fourth Amendment and Equal Protection. Defendants argue that plaintiff has failed to come forward with evidence tending to show that McCandless violated his constitutional rights. *See* Dkt. 72, at 16.

In his response to the summary judgment motion, plaintiff sets forth the following evidence about McCandless' role in the events at issue, which the Court must take as true. McCandless asked Sherwood "why are you hiring all these blacks[?]," and McCandless and Rohrer referred to Sherwood's shop on other occasions as "SherHood." *See* Dkt. 83, at 4; Dkt. 84, at 3; Dkt. 86-3, at 7. Another custodial crew member noticed McCandless and Rohrer watching the custodial crew as if they were looking to find something wrong. Dkt. 84, at 2. In January 2016, plaintiff told McCandless that plaintiff was allergic to a portion of his lunch; Rohrer intervened in this disagreement. Dkt. 83, at 8. A few days later, McCandless stood by while Rohrer yelled at and belittled plaintiff. Dkt. 86-2, at 15. McCandless confiscated plaintiff's fingerless gloves and plaintiff's and the rest of the custodial crew's safety glasses. Dkt. 83, at 14.

Defendants argue that plaintiff has failed to show that his allegations that McCandless acted based on racial animus are founded on anything more than speculation. Dkt. 72, at 17. In the Court's view, plaintiff's allegations that McCandless made repeated racially charged comments about Sherwood's custodial crew (*see* Dkt. 83, at 4; Dkt. 84, at 3; Dkt. 86-3, at 7), stood by allegedly laughing while Rohrer berated plaintiff (Dkt. 86-2, at 15), and worked alongside Rohrer are adequate evidence from which a reasonable fact finder could conclude that McCandless was also motivated by racial animus when he confiscated plaintiff's fingerless

1 gloves and confiscated plaintiff's and the rest of the custodial crew's safety glasses. Dkt. 83, at
2 14.

3 Defendants also assert that plaintiff has not shown "that other similarly situated
4 individuals were not 'talked to . . . regarding safety glasses being taken.'" Dkt. 72, at 17.¹ But
5 plaintiff has come forward with evidence that McCandless confiscated all the custodial crew's
6 safety glasses, even though the other crews were allowed to wear safety glasses. *See* Dkt. 83, at
7 14; Dkt. 84, at 3; Dkt. 85, at 3. This is adequate evidence to create a factual conflict regarding
8 whether a similarly situated group of non-black offenders was treated differently.

9 Defendants argue that none of this evidence shows that McCandless participated in either
10 the implementation of the strip search policy or the strip searches. *See* Dkt. 72, at 17. In
11 response, plaintiff points to no evidence that McCandless participated in the strip search policy's
12 implementation or execution, so that plaintiff fails to show that the Fourth Amendment claim
13 against McCandless should survive the summary judgment motion. *See* Dkt. 82, at 6; *see also*
14 Dkt. 83, at 6 (plaintiff's declaration that his coworkers and he "were harassed by Rohrer and
15 subjected to at least 25 nude strip searches or more, conducted by" officers other than
16 McCandless). Therefore, to the extent that plaintiff brings suit against McCandless for violating
17 the Fourth Amendment, such a claim should be dismissed. Moreover, as noted above, plaintiff
18 has conceded to dismissal of any retaliation claim against McCandless and his Due Process and
19 Eighth Amendment claims. *See* Dkt. 82 at 24 & n.10. The sole remaining claim against
20 McCandless should be for violating Equal Protection by allegedly confiscating the gloves and
21 safety glasses.

23
24 ¹ Defendants do not argue that plaintiff has failed to show a similarly situated comparison
group related to his claim about the gloves.

IX. Qualified Immunity

Defendants argue that they are entitled to qualified immunity from plaintiff's claims for damages because plaintiff "has failed to demonstrate a constitutional violation" and because defendants were acting consistent with legitimate concerns related to prison security. *See* Dkt. 72, at 24. As discussed in detail above, the Court finds that plaintiff has provided evidence from which a rational trier of fact could find in his favor on his remaining constitutional claims. Moreover, this evidence also supports that Rohrer and McCandless were not, in fact, acting consistent with legitimate correctional concerns, but rather with racial animus and that Rohrer acted on the basis of retaliation and did not legitimately believe that plaintiff was a security concern.

Defendants' argument regarding whether the law at issue was clearly established at the time merely reiterates their conclusion that Rohrer was simply "creat[ing] strip search procedure" and "express[ing] concerns about Hunter's misbehavior when [Rohrer] had genuine safety and security concerns about both of those issues[.]" Dkt. 87, at 13. When considering a qualified immunity argument on summary judgment, the Court takes the facts in the light most favorable to plaintiff. *E.g. Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001). Defendants' characterization of the facts is flawed because it looks to the facts in the light most favorable to them, however, when assessing whether the actions at issue violated clearly established law. Qualified immunity should not be granted, and the Court declines to further address defendants' conclusory qualified immunity arguments.

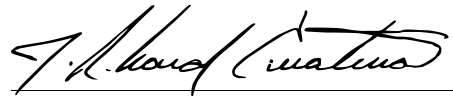
CONCLUSION

The summary judgment motion (Dkt. 72) should be granted in part and denied in part. The District Court should accept plaintiff's narrowing of his claims to allegations that Rohrer

1 and McCandless violated Equal Protection and the Fourth Amendment and that Rohrer also
2 retaliated against plaintiff and should dismiss all other claims. The Fourth Amendment claim
3 against McCandless should also be dismissed, but the remaining claims should survive. Gilbert
4 should be terminated as a defendant in this action.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
6 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
7 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*
8 review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a result in a waiver
9 of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Miranda v.*
10 *Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit
11 imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **May 7, 2021**
12 as noted in the caption.

13 Dated this 21st day of April, 2021.

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16 J. Richard Creatura
17 Chief United States Magistrate Judge
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